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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of

Amendment of Section 73.202(b)	)	MM Docket No. 94-122
Table of Allotments,	)	RM-8513
FM Broadcast Stations,	)	
(Atlantic and Glenwood, Iowa)	)	

To: The Chief  
Allocations Branch  
Policy and Rules Division  
Mass Media Bureau

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**OPPOSITION TO MOTION TO STRIKE AND RETURN AS  
UNACCEPTABLE COMMENTS AND COUNTERPROPOSAL**

Wireless Communications Corp. ("Wireless"), hereby opposes the Motion to Strike and Return as Unacceptable Comments and Counterproposal filed by Stephen O. Meredith ("Meredith"), the permittee of Station KSOM(FM), Audubon, Iowa. Meredith's untimely and meritless pleading is filed in response to the Comments and Counterproposal submitted by Wireless in the above-referenced rule making proceeding involving FM channel allotments at Atlantic and Glenwood, Iowa. In support thereof, Wireless states as follows.

**I. Meredith's Pleading is Procedurally Defective**

1. The Commission's procedures for the handling of rulemaking procedures are set out in Sections 1.415 and 1.420 of the Rules and Regulations. These provisions specify that the pleading cycle in a rulemaking proceeding consists of comments, including comments in the form of counterproposals, under Section

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1.420(d), on the proposed rule, followed by reply comments responding thereto. In fact, Section 1.415(d) provides that no "additional comments may be filed unless specifically requested or authorized by the Commission."

2. The Commission has received comments and reply comments in this matter. Having failed to file a timely pleading, Meredith styles his pleading as a Motion to Strike and Return. In fact, the pleading is a thinly disguised reply comment. As the time for the filing of such a pleading has long passed, and Meredith has not requested that the Commission permit his unauthorized pleading, the Commission has no choice but to dismiss Meredith's motion as procedurally defective.

## **II. Meredith's Substantive Claims Are Without Merit**

3. Turning to the merits of the matter at issue, Meredith argues that Wireless was not entitled to propose the allotment of a new FM radio station at Atlantic, Iowa as a counterproposal in this proceeding. This claim is wide of the mark.

4. Initially, the Commission must not ignore the factual context in which this case exists. Meredith is the permittee of a new and unbuilt FM radio station in the community of Audubon, Iowa. The proposed facility will also provide coverage of the larger community of Atlantic, Iowa.

5. The rulemaking proposal submitted by Valley Broadcasting, Inc., the licensee of Station KXKT(FM), Atlantic, Iowa ("Valley"), involves the removal of the allotment of FM Channel 279C at Atlantic, Iowa and its reallocation to Glenwood, Iowa, a

community at some distance from Atlantic. The result would be the elimination of the sole FM station licensed to Atlantic and a competitor for Meredith's new and unbuilt station.

6. Wireless, which operates a day-time only AM station in Atlantic, did not object to Valley's proposal to reallocate Channel 279C from Atlantic to Glenwood. However, it was concerned that the community would lose its only full-time media voice. Taking note that Valley had presented an engineering showing that five alternative channel allotments could be utilized at Atlantic, Wireless urged the Commission to allocate Channel 239C3 to Atlantic, thereby maintaining a full-time FM station at Atlantic. In its Reply Comments, Valley presented no objection to Wireless's counterproposal.

7. Meredith does not state why he now opposes the Wireless counterproposal, except that Wireless should not have utilized the counterproposal to present it. If Meredith's intent is to preserve the sanctity of the Commission's procedures, it is certainly a worthy expenditure of a private party's funds. However, if his motives lie elsewhere, perhaps in attempting to prevent the entry into its market of a potential competitor, the Commission should weigh the claims made accordingly.

8. Concerning those procedural claims, Meredith fails to make note of the result which Valley has sought in the rule making and the Commission's own solicitation of relevant comments, such as those presented by Wireless. Notice of Proposed Rule Making, 9 FCC Rcd 139 (1994) ("NPRM"). Unlike the

allotment proceedings for a new facility, the Commission has solicited comments only because Valley is requesting to change communities of license; any other mutually exclusive modification of Valley's license would not have been subject to notice and comment procedures.<sup>1</sup>

9. In Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, 5 FCC Rcd 7094 (1990), the Commission indicated that community change rulemakings, such as this one, would include a consideration of the "effect of the proposal on existing service to the public...." Id. at 7097. Thus, the Commission took the opportunity in the NPRM to make a specific solicitation of further comments on its proposal.

10. Responding thereto, Wireless advised the Commission that Atlantic's population should not lose its only full-time media voice.<sup>2</sup> It alerted the Commission that it could modify the

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<sup>1</sup> The proceedings relied on by Meredith are inapposite. Availability of FM Broadcast Assignments, 5 FCC Rcd 931 (1990), dealt with procedures that the Commission was to follow as a result of a decision of the Court of Appeals dealing with allotment procedures establishing in the Docket 80-90 proceeding. In Canovanas, Puerto Rico, 7 FCC Rcd 3324 (1992), the Commission was not dealing with a single party seeking to change its community of license. Moreover, as Meredith was forced to note, the Commission did not dismiss the counterproposals, but simply issued a further notice of proposed rule making.

<sup>2</sup> Meredith attributes the pleading filed by Wireless to an attempt to have the allotment considered without any mutually exclusive filings. Wireless had no such intention and is not aware of any party or parties that were interested in counterproposals. In fact, the absence of any reply comments, including by Meredith, are indicative of the lack of such interest on the part of anyone.

Table of Allotments to accommodate the needs of Atlantic and Glenwood. This could be accomplished by granting Valley's request and by allotting FM Channel 239C3 to Atlantic.

11. In the standard Appendix that supplements rule making notices, including the NPRM, the Commission makes clear, at Paragraph 3(c), that it has the authority to allot channels that are different from that contained in the rule making request or any counterproposal. This entitles the Commission, acting under the authority of the Administrative Procedure Act, 5 U.S.C. 553 ("APA"), to reach a result based on the notice given to the public and responses it has received. See Owensboro on the Air v. United States, 262 F. 2d 702, 707-708 (D.C. Cir. 1958). In this case, the NPRM sought comments on how to achieve allotment objectives at Atlantic and Glenwood. An allotment plan that meets the actual needs of Atlantic and Greenwood, by providing both with full-time FM allotments, is a "logical outgrowth" of the NPRM and one the Commission can act upon. Weyerhaeuser Co. v. Costle, 590 F. 2d 1011, 1031 (D.C. Cir. 1978).

#### IV. Conclusion

12. This rulemaking proceeding involves the issue of the reallocation of an FM station providing wide area coverage from a rural community to one in the vicinity of a major market. In its weighing of the merits of such a proposal, the Commission must judge the impact of such a change on the impacted communities. Wireless, in its pleading, submitted a proposal that would result in service to both communities. Time and again, the Commission

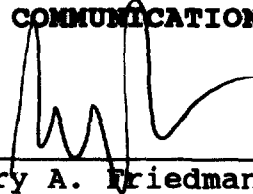
has used the allotment process to achieve the distribution of transmission and reception services required by Section 307(b) of the Communications Act. See, e.g., Bay City, Brenham, et al., 8 FCC Rcd 1552 (1993). Wireless's pleading should, therefore, be considered and its proposal granted. Such a result not only serves the public interest but is in accord with the Commission's authority under the APA and its Section 307(b) responsibilities.

WHEREFORE, it is respectfully requested that the Motion to Strike and Return as Unacceptable Comments and Counterproposal be dismissed as procedurally defective, or, alternatively, denied.

Respectfully submitted,

**WIRELESS COMMUNICATIONS CORP.**

By: \_\_\_\_\_

  
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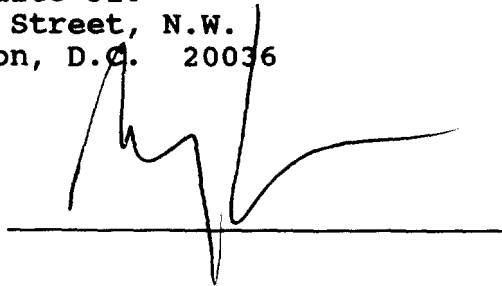
Dated: April 18, 1995

CERTIFICATE OF SERVICE

I, Barry A. Friedman, do hereby certify that I have, on this 17th day of April, 1995, served a copy of the foregoing "Opposition to Motion to Strike and Return as Unacceptable Comments and Counterproposal," upon the following parties by first-class mail, postage prepaid:

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A handwritten signature in black ink, appearing to be "Barry A. Friedman", is written over a horizontal line.